Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-3139-I

Appeal MA13-558

City of Toronto

December 18, 2014

Summary: The appellant, a company involved in the food service industry, sought access to records held by Toronto Public Health relating to one of its locations. The city responded to the request by stating that the records are excluded from the operation of the *Act* as a result of section 52(2.1) (records relating to an ongoing prosecution) because the city was in the process of prosecuting the appellant for violation of the city's "Holiday Shopping" by-law at several of its other retail locations. The city also stated that, in the alternative, access to the records was denied on the basis of the exemptions in sections 8(1)(b) and 8(2)(a) (law enforcement).

This order finds that section 52(2.1) does not apply, as the requested records do not relate to an ongoing prosecution. It also finds that the records do not qualify for exemption under section 8(1)(b) or 8(2)(a) and orders the city to disclose the records, except for any personal information contained in them.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 52(2.1), 8(1)(b), 8(2)(a).

Orders Considered: Orders MO-2439, MO-3101, MO-3103, PO-1959.

Case Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

> We request full disclosure of all information regarding [the named corporate requester] located at [a specified address] which [includes] files on all complaints, all investigations, all photos, all reports, all resolutions, and all findings from January 01, 2010 to September 10, 2013.

[2] In response, the city issued a decision denying access to the requested information on the basis that any responsive records were excluded from the scope of the *Act* because of the application of the exclusion in section 52(2.1) (ongoing prosecution) of the *Act*.

[3] The appellant's representative wrote to the city asking for the particulars of the prosecution upon which the city relied to deny access to the records. The city responded by letter, providing the appellant with two specific court file numbers related to the prosecution referred to.

[4] The city subsequently issued a revised decision advising that access to the records is also denied on the basis of the exemptions in section 8(1)(b) and 8(2)(a) (law enforcement) of the *Act.*

[5] The appellant, through its representative, appealed the city's decision.

[6] During mediation, the city maintained that the records are excluded by virtue of section 52(2.1) of the *Act* and that, in the alternative, the exemptions in sections 8(1)(b) and 8(2)(a) apply to the records. The appellant maintained that there is no prosecution or proceeding relating specifically to the requested location.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially, and the city provided representations in response.

[8] I then sent the Notice of Inquiry, along with a complete copy of the representations of the city, to the appellant, who also provided representations. Those representations were then shared with the city, which provided reply representations.

[9] In this order, I find that section 52(2.1) does not apply, as the requested records do not relate to an ongoing prosecution. I also find that the records do not qualify for exemption under section 8(1)(b) or 8(2)(a), and order the city to disclose the records, except for any personal information contained in the records.

RECORDS:

[10] There are 56 pages of records at issue in this appeal, including emails, complaints and reports.

ISSUES:

A: Does the exclusion in section 52(2.1) of the *Act* apply to the records?

B: Do the discretionary law enforcement exemptions at sections 8(1)(b) and/or 8(2)(a) apply to the records?

DISCUSSION:

Issue A. Does the exclusion in 52(2.1) of the *Act* apply to the records?

Background

[11] The appellant is a company involved in the food service industry, and has a number of retail locations in the city. Because of its involvement in the food service industry, Toronto Public Health is involved in inspections and in responding to health-related complaints about the various locations operated by the appellant. Because it is a retail establishment, the appellant is also subject to the requirements relating to holiday shopping, set out in the city's *Municipal Code* Chapter 510, (the city's by-law regulating "Holiday Shopping").

[12] The city states that in 2011, an investigation and prosecution was conducted by Toronto Public Health involving one of the retail locations operated by the appellant, which resulted in a closure order being issued with respect to that location. The city also confirms that the enforcement and prosecution activities of the city in relation to that location were eventually resolved. I will refer to this health-related prosecution as the "2011 prosecution." I note that the 2011 prosecution was in relation to one of the appellant's retail locations, but not the retail location about which the records at issue in this appeal relate.

[13] The city then states that in August of 2013 it commenced a proceeding before the Ontario Court of Justice under the *Provincial Offences Act*, concerning potential violations of the city's *Municipal Code* Chapter 510, related to various business locations operated by the appellant on a holiday (July 1, 2013 - Canada Day). The city refers to these proceedings as the "First Prosecutions."

[14] The city also states that further proceedings before the Ontario Court of Justice under the *Provincial Offences Act* were commenced in September of 2013, also concerning potential violations of the city's *Municipal Code* Chapter 510, related to various business locations operated by the appellant on a holiday (September 2, 2013 - Labour Day). The city refers to these as the "Second Prosecutions."

[15] The city confirms that the First and Second Prosecutions relate to various locations operated by the appellant, but again, not the retail location to which the records at issue in this appeal relate.

[16] The city takes the position that the records at issue in this appeal are excluded from the *Act* because of the application of the exclusion in section 52(2.1), which reads:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

General principles

[17] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.[1]

[18] The term "prosecution" in section 52(2.1) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.[2]

[19] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."[3]

[20] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.[4]

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[1] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (CanLII), March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).
[2] Order PO-2703.
[3] *Toronto Star*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP),* 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.
[4] Order PO-2703.

Preliminary issue - Burden of proof

[21] The city confirms that the issue of whether the exclusion in section 52(2.1) applies is a jurisdictional issue and argues that, where a jurisdictional issue is raised, the burden of proof that the exclusion applies does not rest primarily or solely on the city.

[22] In its representations, the city refers to previous orders of this office which have established that the onus of proof for a proposition lies with the party who is advancing it.[5] The city argues that, in the current appeal, it is the appellant that is advancing a proposition (that the general right of access provided by section 4 of the *Act* applies to the responsive record), and that the appellant therefore has the onus to show that the exclusion does not apply. It states:

> In the current circumstances, the proposition that must be established is [the appellant's] allegation that the general right of access provided by section 4 of [the *Act*] applies to documents responsive to the request, and not whether an exemption applies to deny access to the records.

[23] In support of its position, the city refers to one of the purposes of the section 52(2.1) exclusion (to ensure that on-going prosecution[s] are not impeded by requiring institutions having to address access-to-information requests related thereto), and that placing the onus on the city to "disprove unsupported allegations" that the request for the records does not have some connection to the current prosecution is "not consistent with the purpose of the exclusion."

[24] The city also provides an ancillary argument, claiming that if an onus is imposed on the city to establish that section 52(2.1) applies, this onus on the city "cannot be absolute," because whether or not a record has or will have a connection to a prosecution "is not a matter which is primarily or entirely within the knowledge of the city."[6]

[25] In its reply representations, the city reviews its record-holdings relating to various health-related complaints resulting in enforcement and prosecution activities by the city. The city acknowledges that the "First" and "Second" prosecutions relate only to prosecutions for holiday shopping, but notes that the request for information in this appeal, (and similar requests by the appellant relating to other records and/or locations) was submitted by the appellant very shortly after the "First Prosecutions" were commenced.

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[5] The city refers to the case of *Dow Chemical of Canada v. Pritchard* [1970] OJ. No. 829 (H.C.J.).

[6] A more detailed review of the city's arguments can be found in Orders MO-3101 and MO-3103, where the city made similar arguments about the burden of proof for section 52(2.1).

[26] The city then states:

> … the City has alleged that section 52(2.1) applies …, and [the appellant] states it does not. While the City agrees that in such a determination, the City may need to advance information to establish the application of section 52(2.1), some information necessary to determine the question of jurisdiction is unknown to the City, and lies squarely with [the appellant], as such the onus imposed on the City concerning the application of [the *Act*] cannot be absolute.
>
> In particular, confirmation of whether or not [the appellant] is intending to use this information in relation to a proceeding related to a prosecution, … has not been provided to the IPC.
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> The City has reasonably assumed, in the absence of this information, however, based on [the appellant's] pattern of conduct and the nature of the information in question that there some connection between this information, and a proceeding relating to a prosecution.

[27] Previous orders have considered the issue of the burden of proof in circumstances where an exemption claim is not at issue. As noted, this office has previously established that the onus of proof for a proposition lies with the party who is advancing it. In Order MO-2439, former Senior Adjudicator John Higgins reviewed the onus of proof in circumstances when exemptions are not at issue. In that appeal, the senior adjudicator had to determine whether the confidentiality provision in section 181 of the *City of Toronto Act, 2006* (COTA) applied and prevailed over the *Act*. In his discussion of the burden of proof, he stated:

> I agree with the city that section 181 of the *COTA* is not an exemption under the *Act*, and strictly speaking, section 42 therefore does not apply. However, for the reasons that follow, I do not agree that section 181 of the *COTA*, … has the effect of creating an onus on requesters to prove that it does not apply.
>
> Although section 42 is not strictly applicable as assigning an onus of proof where an institution relies on a confidentiality provision in another statute, rather than an exemption under the *Act*, I believe that this section still provides assistance in assessing the question of onus. In my view, section 42 indicates an intention on the part of the Legislature that, where a record is in the custody or under the control of an institution such as the City, the onus of proving non-accessibility under the *Act* rests with the institution. This is consistent with the purpose of the *Act* in section 1(a)(i) to "provide a right of access to information under the control of

institutions in accordance with the principle[] that … information should be available to the public."

Even without relying on section 42, the City's argument that the burden of proof in this case falls on the appellant is without merit and unsustainable in law.

Section 4(1) of the *Act* stipulates that "[e]very person has a right of access to a record or part of a record under the custody or control of an institution unless …" the record is exempt under sections 6 to 15 or the request is frivolous or vexatious. This is the primary section establishing that the *Act* applies to the record holdings of institutions. There are several other sections setting out instances where the *Act* either does not apply (section 52), or records are not accessible because of a prevailing confidentiality provision (section 53). As noted above, the City relies on section 53 in conjunction with section 181 of the *COTA*.

Based on section 53 of the *Act* and section 181 of the *COTA*, the City seeks to prove that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are in fact not accessible because of a prevailing confidentiality provision. The City thus seeks to oust the accessibility of records under the *Act*, which would otherwise be subject to the access scheme established under the *Act* for records under the City's custody or control.

Seen in that light, it is clear that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely. The City wishes to remove the requested record from that positive right. In my view, the law of evidentiary burdens would place the onus of proof to accomplish that objective on the City. Failure by the City to establish the application of section 181(1) of the *COTA* will have the result that the City does not succeed on this point, and the *Act* would be found to apply.[7]

It is also unfair, unreasonable, and contrary to the purpose of the *Act*, cited above, for the City to suggest that requesters have the onus of disproving that section 181 of the *COTA* applies to records they have requested. To discharge such an onus, a requester would need: (1) detailed knowledge of the City's record holdings; (2) knowledge of the precise nature of what records exist in the City's record holdings that may be responsive to his or her request, and (3) knowledge of where copies of such records would be located within the City's records. This information

[7] The former Senior Adjudicator refers to *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.).

> would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, [1970] O.J. No. 829 (H.C.J.), the onus of proving information that is peculiarly within the knowledge of a party rests with that party, in this case, the City.
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> For all these reasons, I find that the burden of proving the application of section 181 of the *COTA*, in conjunction with section 53 of the *Act*, falls on the City in this appeal.

[28] I adopt the conclusions of former Senior Adjudicator Higgins, and apply them to the circumstances of this appeal.

[29] In this appeal, the city takes the position that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are not accessible because of the application of the exclusion in section 52(2.1). The law of evidentiary burdens places the onus of proof to establish that on the city, and failure by the city to establish the application of section 52(2.1) will result in a finding that the *Act* applies.

[30] I also agree with the former senior adjudicator that it is unfair, unreasonable, and contrary to the purpose of the *Act* to suggest that requesters have the onus of disproving that the exclusion applies. As stated in Order MO-2439, this would require a requester to have: (1) detailed knowledge of the city's record holdings; (2) knowledge of the precise nature of what records exist in the city's record holdings that may be responsive to the request, and (3) knowledge of where copies of such records would be located within the city's records. This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, the onus of proving information that is peculiarly within the knowledge of a party rests with that party. In this case, the city is that party, as it has the records.

[31] As a result, I find that the burden of proving the application of section 52(2.1) of the *Act* falls on the city in this appeal.

[32] Lastly, with respect to the city's position that any onus which it bears to establish that section 52(2.1) applies cannot "be absolute," in my view, this alternative argument does not go to the issue of which party has the burden of proof, but rather, it goes to the weight of the evidence regarding whether the exclusion applies. This evidence can be found, *inter alia*, in the representations of the parties, the circumstances of the appeal, and the records themselves. I review the evidence in this appeal regarding whether section 52(2.1) applies below.

Representations on whether section 52(2.1) applies

The city's initial representations

[33] The city states that the request in this appeal relates generally to the city's law enforcement activities concerning a retail location operated by the appellant. The city claims that section 52(2.1) applies to the records relating to the appellant, and confirms that it is currently in the process of proceeding with the "First" and "Second" prosecutions relating to other retail locations operated by the appellant.

[34] Regarding the application of the exclusion in section 52(2.1) the city refers to the following three elements that must be established for the section 52(2.1) exclusion to apply:[8]

- There is a prosecution.
- There is some connection between the record and a prosecution.
- All of the proceedings with respect to the prosecution have not been completed.

[35] The city then states that, in the current matter, there is "no possibility of dispute concerning the fact that the first and third elements have been established." It states:

> There are currently multiple prosecutions proceeding involving [the appellant] and the City. The City submits that a proceeding before the Ontario Court of Justice under the *Provincial Offences Act* concerning potential violations of a municipal by-law would constitute a "prosecution" for purposes of section 52(2.1) …

[36] The city then summarizes the various court dates and appearances, and states "It cannot be stated that all matters relating to these prosecutions are concluded." It then confirms its position that the only outstanding issue is whether there is "some connection" between the subject matter of the request and the on-going prosecutions, and argues that the subject matter of the request has "some connection" to the on-going prosecutions relating to the appellant. It states:

> What is known, is that [the appellant] - the defendant in the First and Second Prosecutions - has requested "full disclosure" of "all information" held by the city. … The city has made full disclosure of the information which it believes is relevant to the current prosecutions.

[37] The city then states that while it may believe that all of the information relevant to the First and Second Prosecutions has been produced in accordance with the city's

[8] See Order PO-3260.

disclosure obligations, the defendant in those prosecutions (who is the appellant in the present appeal) may have a different opinion, and is seeking additional disclosure for other possible reasons (including research or for use in interlocutory proceedings) relating to the ongoing prosecutions for other offences at other locations. It then states:

> The purpose of section 52(2.1) is to prevent such uses of [the *Act*], as to preserve the integrity of the court system by requiring such research to be undertaken within the context of the processes established for the exchange of information in these contexts. …

[38] The city then distinguishes this appeal from the finding in Order PO-3260, and then states:

> … In the current circumstances, it is [the appellant] who has filed a request days after one prosecution had been commenced, and another investigation conducted seeking "full disclosure" of enforcement activities for the last several years at the [identified] location.

[39] The city also confirms that the request was made "at the same time as numerous other requests for information" and that:

> These requests for information included requests relating to past and present enforcement and investigation efforts concerning [the appellant's] operations, the subject matter of the current prosecutions, including the previous aforementioned 2011 enforcement efforts. …

[40] The city then states that it believes that the appellant's conduct establishes a belief that the information has "some connection" to the current or previous prosecutions.

[41] Finally, the city reviews the purposes of section 52(2.1) and states that a finding that this section applies in this appeal would meet those purposes. It concludes by stating:

> To conclude otherwise, would require the city, in the first instance, or now the IPC, to be satisfied that [the appellant] simply requested for reasons (as of yet undisclosed) [records] unrelated to the current or past prosecutions. With respect, the city does not believe that it is reasonable to conclude in these circumstances that, in the absence of information to the contrary, that the current [request is] unrelated to the current prosecutions against [the appellant].

The appellant's representations

[42] The appellant also refers to the *Toronto Star* decision[9] and its finding that there must be "some connection" between the records and the prosecution. The appellant argues that there is no connection between the records at issue in this appeal and the current ongoing prosecutions, and states that neither of the two "prosecutions" relate to the subject location referenced in the request resulting in this appeal. The appellant refers to the city's representations, and states:

> … as stated by the city … the purported "prosecutions" that [the city relies on] "relate to various locations but not the address that is the subject matter of the current request."
>
> Furthermore, the purported prosecutions pertaining to [two of the appellant's locations] are narrow and specific proceedings. They relate strictly to the sale of goods on a single specified date, and have nothing whatsoever to do with [the subject location] or Public Health, which is the subject of the within Access Request.
>
> There is no reasonable basis to believe that the investigation into the sale of goods on a single date would in any way involve the files requested in the within Access Request.
>
> … the city is attempting to deny the within access request on the basis of purported investigations and proceedings concerning altogether separate locations and entirely different subject-matters.

Reply representations

[43] In reply, the city notes that the test is not whether a document relates to an investigation, but rather to a proceeding that is related to a prosecution. It also states that the subject matter of the request could have "some connection" to the on-going prosecutions, and identifies "other methods" in which the requested documents could have some connection to the current prosecutions or "non-concluded proceedings related to previous prosecutions." It also argues that the appellant could have disproved potential connections between the records and the ongoing proceedings, but that it has not done so. It concludes by reviewing the purpose of section 52(2.1) and stating:

> In the current circumstances, it is [the appellant] who has filed a request days after one prosecution had been commenced, and another investigation conducted, as part of a pattern of requests. The city

[9] See footnote 1, above.

> believes that the conduct of [the appellant] establishes a belief that the information has "some connection" to the current prosecution.

Analysis and findings

[44] In order for the exclusion in section 52(2.1) to apply, the party relying on section 52(2.1) must establish that:

- There is a prosecution.
- There is some connection between the record and a prosecution.
- All of the proceedings with respect to the prosecution have not been completed.[10]

[45] The issue before me is whether there exists "some connection" between the records at issue and the First and Second prosecutions.

[46] The Divisional Court addressed this part of the provincial equivalent of the section 52(2.1) exclusion in the *Toronto Star* decision, cited above. Its analysis included an examination of the purposes of the exclusion in section 52(2.1), which it described as follows:

> We agree … that there are additional important purposes underlying [section 52(2.1)], including the following:
>
> > 1) to ensure that the accused, the Crown and the public's right to a fair trial is not jeopardized by the premature production of prosecution materials to third parties; and
> >
> > 2) to ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.
>
> The purposes of [section 52(2.1)] … include maintaining the integrity of criminal justice system and ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution …

[47] In this appeal, the request is clearly for records maintained by the city's Public Health Division relating to an identified retail location. However, the ongoing prosecutions relate to possible violations of the city's "holiday shopping" by-law at two other retail locations operated by the appellant.

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[10] See Order PO-3260.

[48] The city, which is conducting the ongoing prosecutions, has not provided evidence that it intends to rely on the records at issue, which relate to possible health violations, in the prosecutions, which relate solely to the possible violation of the city's holiday shopping by-law. The city speculates as to how the appellant might use the records in the prosecutions. The only real evidence provided by the city about a connection between the records and the ongoing prosecutions is the fact that both relate to retail locations operated by the appellant, and that the request in this appeal (and other requests made by the appellant) was made very shortly after one of the current prosecutions was commenced, and while the other investigation was ongoing. The city states that the conduct of the appellant establishes a belief that the information has "some connection" to the current prosecutions.

[49] I have reviewed the representations of the parties, including the city's summary of the circumstances surrounding this request and other similar requests made by the appellant. I have also reviewed the records at issue in this appeal, which relate exclusively to complaints and investigations of health-related matters.

[50] In my view, the records at issue in this appeal are not "prosecution materials" as contemplated by the court in *Toronto Star.* There is no evidence that the city will be relying on the records as part of its case in the ongoing prosecutions. Even if the exclusion could protect a broader range of materials than those relevant to the prosecutor's case or the conduct of the proceeding (as referenced in Order PO-3260), the evidence in this appeal does not establish the requisite relationship between the records and the proceedings in the prosecutions. I find that the records at issue in this appeal do not fall within the ambit of the section 52(2.1) exclusion as they are not "records relating to a prosecution". The city's speculations about potential use of the information by the appellant provide no basis for finding that they do. On my review of the representations, the records and the circumstances of this appeal, I find that the city has not provided sufficient evidence to establish "some connection" between the records at issue and the First and Second prosecutions.

[51] As a result, I find that the records are not excluded from the operation of the *Act*.

Issue B. Do the discretionary law enforcement exemptions at sections 8(1)(b) and/or 8(2)(a) apply to the records?

[52] The city takes the position that the discretionary exemptions at sections 8(1)(b) and and/or 8(2)(a) apply to the records. These sections read:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[53] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[54] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law[11]
- a police investigation into a possible violation of the *Criminal Code*[12]
- a children's aid society investigation under the *Child and Family Services Act*[13]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[14]

[55] The term "law enforcement" has been found *not* to apply in the following circumstances:

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[11] Orders M-16 and MO-1245.
[12] Orders M-202 and PO-2085.
[13] Order MO-1416.
[14] Order MO-1337-I.

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.[15]

- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[16]

[56] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[17]

[57] The institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".[18] Evidence amounting to speculation of possible harm is not sufficient.[19]

[58] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption.[20]

Section 8(1)(b) – interfere with an investigation

[59] The city takes the position that the records qualify for exemption under this section. It states:

> The records in the current appeal are complaints, emails, and reports made by City Staff. As noted above, the City has conducted investigations during the relevant time period concerning the [identified] location. There is no issue that - in fact, [the appellant] is expressly requesting complaint, and investigation notes with respect to this location.
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> Section 8(1)(b) states that disclosure of a record could interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. Currently, the City is in the process of law enforcement activities (the

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[15] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).
[16] Order P-1117.
[17] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[18] See footnote 5, above.
[19] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[20] Order PO-2040; *Ontario (Attorney General) v. Fineberg.*

> abovementioned prosecutions). For the same reasons as mentioned above, it is the City's position that disclosure of the documents outside of the context of processes provided in this scenario may interfere with these matters.
>
> It is the City's submission that in the context of the numerous requests, and the current prosecutions, it can be claimed that disclosure of these documents will be used in some way by the requester in relation to the City's current prosecution efforts. The multi-faceted disclosure of documents will complicate the ability for the City to manage the current prosecutions. Prosecutions of violations of municipal by-laws are included in the context of matters that are included in "law enforcement". The City submits, that section 8(1)(b) has been established as applicable - as the disclosure will result in the same harms as indicated in the submissions made in section 52(2.1) - in particular, the requirement to require the prosecutors to participate in parallel processes, such as the current appeal, while prosecutions are on-going.

[60] The appellant takes the position that the city has not provided sufficient evidence in support of its position that section 8(1)(b) applies. In reply, the city states that it has provided sufficient evidence to establish that the harms in section 8(1)(b) apply.

Findings

[61] Previous orders have confirmed that, in order for section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[21] The investigation in question must be ongoing or in existence.[22]

[62] On my review of the city's representations and the records at issue in this appeal, I find that the records at issue do not qualify for exemption under section 8(1)(b).

[63] Although I accept that the records relate to complaints and resulting investigations into those complaints about the appellant's specific retail location identified in the request, I am not satisfied that the disclosure of the records would interfere with an ongoing investigation.

[64] In the first place, there is no suggestion that the complaints or investigations referred to in the records at issue are ongoing. All of the investigations arising from

[21] Order PO-2085.
[22] Order PO-2657.

any of the complaints identified in the records appear to have been resolved in some way, and I have no evidence that the investigations referred to are ongoing.

[65] Furthermore, with respect to the city's argument that disclosure of the records would interfere with the two current prosecutions relating to the violation of holiday shopping by-laws at two other locations operated by the appellant, I note that the complaints and investigations in the records at issue concern health-related complaints relating to the retail location identified in the request in this appeal, and not the other locations operated by the appellant. I do not accept the city's position that disclosure of the health-related complaints and investigations relating to this retail location could reasonably be expected to interfere with the investigations of holiday shopping violations at two other, separate locations operated by the appellant. In these circumstances, I find that I have not been provided with sufficient evidence to satisfy me that the disclosure of the records would result in the identified harms, and I find that the records do not qualify for exemption under section 8(1)(b).

Section 8(2)(a) – law enforcement report

[66] The city takes the postion that some of the records qualify for exempion under section 8(2)(a), which states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[67] In order for a record to fall within section 8(2)(a) of the *Act*, the city must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[68] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[23]

[23] Orders P-200, MO-1238, MO-1337-I.

[69] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[24]

[70] Section 8(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.[25]

[71] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information," all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous.[26]

[72] In support of its position that some of the records qualify for exemption under section 8(2)(a), the city states:

> Section 8(2)(a) provides that an institution may decide not to disclose a record that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.
>
> Some of the documents are reports created in the context of dealing with complaints. The City has the authority and responsibility to enforce municipal by-laws, and as noted by the IPC, the City received and investigated complaints with respect to such violations. As such the City submits that it has been established that section 8(2)(a) applies to these documents to which it was claimed.

Findings

[73] Generally, occurrence reports and supplementary reports have not been found to meet the definition of "report" under the *Act*, because they are more in the nature of recordings of fact rather than formal, evaluative accounts of investigations.[27] In Order PO-1959, Senior Adjudicator Sherry Liang considered whether certain records constituted "reports" for the purpose of this section.[28] In addressing this issue, she wrote:

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[24] Orders MO-1238, MO-1337-I.
[25] Order PO-2751.
[26] Order MO-1238.
[27] See Orders M-1109, MO-2065 and PO-1845.
[28] The section at issue in that order was section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent of section 8(2)(a) at issue in this appeal.

> [The identified records] consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under [the *Act*], in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations …[29]

[74] I agree with the approach taken in the previous orders issued by this office, and adopt it in this appeal. On my review of the records at issue, most of them simply consist of recordings of various complaints and the responses to those complaints, including complaint forms and email correspondence. These clearly are not "reports" for the purpose of section 8(2)(a). With respect to the records that are named "reports" (for example, Inspection Reports or Supplemental Inspection Reports), I find that these reports are similar in nature to Police Occurrence Reports or supplemental reports, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations. These reports, which include checklists or listings of various possible violations, do not consist of a "formal statement or account of the results of the collation and consideration of information." Accordingly, I find that they do not meet the definition of a "report" under section 8(2)(a) of the *Act* and I conclude that the records do not qualify for exemption under section 8(2)(a).

Final matter

[75] This interim order disposes of the issues raised by the parties in this appeal, and determines that the section 52(2.1) exclusion and section 8 exemptions claimed by the city do not apply to the requested records. However, upon my review of the specific records at issue, I note that some of the records appear to contain the personal information of identifiable individuals. Because this was not identified earlier in this appeal, this interim order requires the city to disclose the records at issue to the appellant, except for any information in the records which may contain the personal information of identifiable individuals. Any such personal information should be severed from the records, and should not be disclosed by the city. In the event that the appellant disputes the city's severances, I remain seized of this appeal to deal with any issues arising from the city's disclosure decisions.

[29] Senior Adjudicator Liang references Orders PO-1796, P-1618, M-1341, M-1141 and M-1120.

ORDER:

1. I order the city to disclose the records at issue to the appellant, except for any information in the records which may contain the personal information of identifiable individuals, which should not be disclosed by the city. The city is to disclose the information to the appellant by **January 19, 2015**.

2. I remain seized of this appeal to deal with any possible issues arising from the city's disclosure decision, in the event that the appellant disputes the city's severances.

Original Signed By: December 18, 2014
Frank DeVries
Adjudicator